Supreme Court, U.S.
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No. 96-235

In The

# Supreme Court of the United States

October Term, 1996

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

*Petitioner,*

v.

STEPHEN B. MACFARLANE,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S SUPPLEMENTAL BRIEF NOTING ERROR IN REPLY BRIEF OF PETITIONER TO AMICUS BRIEF OF THE UNITED STATES

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## JUSTIFICATION FOR RESPONDENT'S SUPPLEMENTAL BRIEF

On December 30, 1996, the United States filed its amicus brief. On January 9, 1997 Petitioner filed its reply. Petitioner's reply was not served on Respondent at the address in his Brief in Opposition. Accordingly it reached Respondent only after an attorney from Washington, D.C., called the undersigned with a question related to Petitioner's reply and a search was initiated which resulted in location of the brief in the Diamond Bar, California Post Office on January 31, 1997.

On January 15, 1997, the Court ordered the transmission of the record from the Ninth Circuit and the lower court apparently to address the confusion created by these two briefs. On January 21, 1997 the undersigned wrote to the clerks of this Court and of the Ninth Circuit in response to this order commenting that there are two courts lower than the Ninth Circuit in this case and the Court's order may be interpreted as requiring the transmission of the records in both of these courts.

Neither of these briefs accurately review the pertinent circumstances, and the two together raise the issue of whether Petitioner has consistently elected a line of argument which bars the invocation of the jurisdiction of this Court.

## THE UNITED STATES MISUNDERSTOOD THE RECORD AND THE POSTURE OF THE CASE

The brief of the United States incorrectly assumes that only a motion for summary judgment was made by

Respondent, ignores the order by the Bankruptcy Court which was clearly final, and doesn't observe the absence of any remand in the District Court's order. It also incorrectly states that materiality of facts was not in issue. United States Brief at 13 n. 5.

The Ninth Circuit in reviewing the order of a District Court or Bankruptcy Appellate Panel sitting as an intermediary appeals court reviews the judgment of the bankruptcy court because it is in as good a position for review as was the appeals court. Respondent in his Ninth Circuit brief pointed that out. Respondent's Brief in Opposition App. 3 citing *In re Marquam Inv. Corp*, 942 F.2d 1462, 1465 (9th Cir. 1991). *See similarly, Cypher Chiropractic Center v. Runski (In re Runski)*, 102 F.3d 744, 745 (4th Cir. 1996). Respondent raised the finality issue in the only portion of his Ninth Circuit brief not printed as an appendix to his Brief in Opposition here, attached to this brief as Appendix D, but contended that it should be resolved in favor of finality for the reasons stated in the Respondent's "Standard of Review" discussion which was printed in Respondent's brief in this Court. Respondent's Brief in Opposition App. 3-6. The United States' brief overlooks the implications of the posture of the District Court as a court of appeal under bankruptcy jurisdiction. The United States' statement that an appeal from a denial of a summary judgment by a District Court is not final is correct, but not applicable and not supported, technically, by the decisions cited except for a strained application of *Bacchus v. Taylor (In re Bacchus)*, 718 F.2d 736 (5th Cir. 1983) which was not even a Bankruptcy Code case. *See contra Turgeon v. Victoria Station, Inc., (In re Victoria Station, Inc.)*, 840 F.2d 682 (9th Cir. 1988) (citing *Caravansary,*

*Inc. v. Passanisi (In re Caravansary, Inc.)*, 821 F.2d 1413, 1414 (9th Cir. 1987) cited by the United States) and *Breyfogle v. Grange Mut. Cas. Co. (In re Gardner)*, 810 F.2d 87 (6th Cir. 1987) (citing *In re TCL Investors*, 775 F.2d 1516 (11th Cir. 1985) cited by the United States).

Contrary to the United States' Brief at 13 n.5, Respondent also clearly raised materiality of the facts relied on by the District Court in finding a factual controversy. Respondent's Brief in Opposition App. 2 (Statement of Issues 2), App. 9 (Argument Summary), App. 12-13 (controverted material fact discussion).

The United States' brief ignores the steadfast assertion by Respondent, and even the opinion in the District Court, that there were two motions before the Bankruptcy Court. Respondent in his motion for reconsideration made that abundantly clear, Appendix A. Respondent's Ninth Circuit brief has the same notation. Respondent's Brief in Opposition App. 4 and 8. Likewise, the District Court opinion. Petitioner's App. 18.

Contrary to the United States' brief, this Court, as well as the Ninth Circuit, adopts the "pragmatic" approach to appeals criticized in footnote 5 of the United States' brief:

> Both the Supreme Court and the Ninth Circuit have stated that they take a "pragmatic approach" to the final judgment rule and may find a judgment final for purposes of that

statute even though the judgment is not technically final.[1]

Respondent therefore suggests that the position of the United States regarding jurisdiction is uninformed, but perhaps correct for the following reason.

## THE PETITIONER HAS CONSISTENTLY ELECTED TO ARGUE ONLY ON SUMMARY JUDGMENT GROUNDS WIHCH ARE INAPPROPRIATE FOR CERTIORARI

The latest brief of the Petitioner indicates an issue of propriety of the Petition may be present. The Petition misled the United States regarding the procedural posture of this case, but this Court should not be misled by it. Petitioner's latest brief is completely contrary to every brief it has filed in this case from inception. Here, for instance, it relies on *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993). Petitioner's Reply to Amicus Brief of United States at 2. In the Ninth Circuit Petitioner referred to this jurisdictional issue as a "one winged flight of fantasy", Appendix E, and dismissed *Ojai* as "totally irrelevant." Appendix E. Petitioner, as indicated in its briefs below, App. 10, 11 and 23, and in its Petition here, at 4, states that it is here appealing only insofar as the summary judgment is involved. Therefore according to the United States it is not properly here.

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[1] Ulrich, Thompson, and Kessler, P.C. and Sidley and Austin, *Federal Appellate Practice Guide: Ninth Circuit* §3.6 at 3-23 (1994) collecting authorities in n.72.

More importantly, perhaps, the Ninth Circuit affirmed on multiple grounds, as urged by Respondent. As noted in Respondent's Brief in Opposition, affirmance may be on any basis appearing in the record and certiorari is not granted merely to review evidence. Petitioner offered no evidence below with which to raise a burden of proof issue and has steadfastly relied solely on a summary judgment argument in which the only issue is whether there are any controverted material facts. That is the only issue which Petitioner can with any procedural integrity raise here and that is not appropriate for certiorari. Petitioner undoubtedly elected this position to avail itself of the de novo standard for review. Having elected that position, it must live or die with it.

If the question on appeal occurs as frequently and is as important as asserted by Petitioner, by most of the rest of the States, and by the United States, then there should be along shortly another appeal in which the question is properly presented.

Respectfully submitted,

ELMER DEAN MARTIN III

## APPENDIX A

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**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| IN RE:<br>STEPHEN B. MACFARLANE,<br>Debtor. | ) District Court<br>) No. 93-1435G/R<br>)<br>) APPELLEE'S MOTION FOR REHEARING AND MEMORANDUM IN SUPPORT (F.R.B.P. 8015) |
| CALIFORNIA FRANCHISE TAX BOARD,<br>Appellant,<br>v.<br>STEPHEN B. MACFARLANE,<br>Appellee. | ) [Hearing Date Reserved:]<br>) DATE: November 28, 1994<br>) TIME: 10:30 o'clock a.m.<br>) PLACE: Courtroom 5<br>940 Front Street<br>San Diego,<br>California |

TO THE CALIFORNIA FRANCHISE TAX BOARD:

YOU ARE HEREBY NOTIFIED that the Debtor/Appellee hereby moves the Court for rehearing and to

amend its judgment in this matter filed June 29, 1994. This controversy is an appeal from a bankruptcy court judgment.

This Motion is made pursuant to Federal Rule of Bankruptcy Procedure 8015 which is intended to be applied consistently with Federal Rule of Appellate Procedure 40. Under Federal Rule of Appellate Procedure 40 "[n]o answer to a petition for rehearing will be received unless requested by the Court. . . . If a petition for rehearing is granted the Court may make a final disposition of the cause without reargument. . . . "

In the event a hearing is held, it will be held at 10:30 o'clock a.m. on November 28, 1994 before the Honorable John S. Rhoades at Courtroom 5, 940 Front Street, San Diego, California.

If the Court requests a response to this Motion, it must be filed in accordance with the Court's request or in any event not later than 14 calendar days prior to November 28, 1994, plus an additional three days if you serve your response by mail.

This Motion is based on the Court's decision in this case filed June 29, 1994, the record on appeal and the accompanying memorandum.

Dated: July 6, 1994

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**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| IN RE:<br>STEPHEN B. MACFARLANE,<br>Debtor. | ) District Court<br>) No. 93-1435G/R<br>) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION FOR REHEARING |
| CALIFORNIA FRANCHISE TAX BOARD,<br>Appellant,<br>v.<br>STEPHEN B. MACFARLANE,<br>Appellee. | ) [Hearing Date Reserved:]<br>) DATE: November 28, 1994<br>) TIME: 10:30 o'clock a.m.<br>) PLACE: Courtroom 5<br>940 Front Street<br>San Diego,<br>California |

## INTRODUCTION

As noted in the Motion, this pleading is governed by Federal Rule of Bankruptcy Procedure 8015. It is a bankruptcy appeal. Federal Rule of Appellate Procedure 40 is made applicable by F.R.B.P. 8015. This procedural context

is discussed in Sections 12.43 and 9.11 of Federal Appellate Practice Guidelines – Ninth Circuit (1994), copies of which are attached at pages 9 to 15 of the Appendices.

## QUESTION PRESENTED ON REHEARING

Should the judgment of the Bankruptcy Court be affirmed because it was not a summary judgment and the findings and conclusions on which it was based have been affirmed by this Court.

## COURSE OF PROCEEDINGS

Debtor filed an objection to a claim of the California Franchise Tax Board. As stated at pages 8 and 9 of Debtor's brief on appeal:

> On March 15, 1993 the bankruptcy court conducted a hearing on the Debtor's objection of the FTB claim. Volume 1 R.A. 167-173. The court ruled that the FTB's claim was prima facie valid but that the Debtor had provided competent evidence that debts existed in 1988 and 1989 and that the debts were worthless in 1988 and 1989 rebutting the presumption of validity of the FTB claim. The court then adjourned the hearing to July 12, 1993 to allow the FTB to conduct discovery and offer evidence.
>
> The FTB chose to forego discovery and offered no evidence. On June 11, 1993 the Debtor filed a motion for summary determination of the claim noting the lack of any activity by the FTB, Volume 1 R.A. 114 and 121, *and in the alternative requested that the objection to the claims of the FTB be determined on the merits on the*

> *evidence submitted applying traditional procedures for ruling on objections to claims. Volume 1 R.A. 122 lines 1-3.* The FTB did not respond with a statement of controverted facts or conclusions of law. It responded with a memorandum which dealt primarily with burden of proof issues and apparently contended that not only must the Debtor prove that the amounts involved were loans which became worthless in the years claimed but also that they were not theft losses. . . .
>
> At the hearing on July 12, 1993 the bankruptcy court comprehensively addressed the issues on the merits of the evidence on the basis of the objection without addressing the summary judgment motion. Volume 1 R.A. 70-83. (Emphasis added).

This Court noted the presence of both the objection and the motion. Decision page 6, lines 10-20. However, this Court did not in its decision note that the motion for summary judgment was expressly in the alternative to a motion for decision on the merits as a controverted matter. On June 29, 1994 this Court affirmed the findings and conclusions but reversed the judgment.

## ARGUMENT

The Bankruptcy Court made findings and conclusions and recited in them that they were pertinent to Debtor's motion "for a denial of the claims of the California Franchise Tax Board . . . in the contested matter commenced by Debtor's objection to such claims. . . . " The Conclusions and the Findings, and the Court's colloquy, indicate that the Court was weighing the evidence in

the context of the objection and not in the content of a summary judgment motion. Vol. 1 R.A. 50-54; Appellee's Brief pages 9 to 10. The judgment likewise does not refer to summary proceedings. Vol. 1 R.A. 50-54.

Neither the Court, Appellee nor the Appellant dealt with this matter at the final hearing as if it was going to be disposed of as a summary judgment.

In addition, the Ninth Circuit has repeatedly held that even though a lower court may have relied on wrong grounds or reasoning, a decision that is correct on any ground fairly supported by the record will be affirmed, even if a ground is not asserted by the appellee or has been expressly disavowed by the appellee. *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 435-36 (9th Cir. 1992); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989); *Lee v. United States*, 809 F.2d 1406, 1408 (9th Cir. 1987); *Beezley v. Fremont Indem. Co.*, 802 F.2d 466 (9th Cir. 1986) (per curiam); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985); *Industrial Indem. Ins. Co. v. United States*, 757 F.2d 982, 987 (9th Cir. 1985) (can affirm if argument is fairly presented in the record); *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987); *Keniston v. Roberts*, 717 F.2d 1295, 1300 & n.3 (9th Cir. 1983); *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980); *Boehm v. American Broadcasting Co.*, 929 F.2d 482, 487 (9th Cir. 1991); *In re Wind Power Sys., Inc.*, 841 F.2d 288, 290 n.1 (9th Cir. 1988) (Ninth Circuit would consider issues first raised on appeal to affirm a summary judgment because the parties were not disputing the bankruptcy court's complete findings of fact and the

issues raised were purely questions of law); *Angle v. United States*, 709 F.2d 570, 573 (9th Cir. 1983) ("we have often asserted that we can affirm a ruling on any ground supported by the record, even if that ground is not asserted by the appellee"); *See, e.g., Aguon v. Calvo*, 829 F.2d 845 (9th Cir. 1987) (appellee unsuccessfully urged the court not to address an issue first raised by the court).

## CONCLUSION

This appeal was filed by the California Franchise Tax Board on August 19, 1993. First assigned to Judge Gilliam, it was reassigned to Judge Huff who recused herself after considering the case, and it was then reassigned to the present judge.

Little purpose would be served by remand to the bankruptcy judge for entry of judgment again on the findings and conclusions which have been affirmed by this Court. Appellee suggests that the Court should affirm the judgment as properly founded upon the findings and conclusions, or, if the Court deem it necessary, explicitly remand for entry of judgment on the findings and conclusions. The remand will require the Appellant

to return to this Court on its way to the Ninth Circuit. Appellee wishes to avoid this circuitous route.

Respectfully submitted,

Dated: July 6, 1994

Elmer Dean Martin III
Attorney for Appellee
Stephen B. Macfarlane

## APPENDIX B

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**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| In re:<br>STEPHEN B. MACFARLANE,<br>Debtor. | District Ct.<br>No. 93-1435G/R<br>APPELLANT'S RESPONSE TO APPELLEE'S MOTION FOR REHEARING<br>[F.R.B.P. 8015] |
| FRANCHISE TAX BOARD,<br>Appellant,<br>-vs-<br>STEPHEN B. MACFARLANE,<br>Appellee. | DATE: November 28, 1994<br>TIME: 10:30 A.M.<br>PLACE: Courtroom "5"<br>940 Front St.<br>San Diego, CA. |

TO THE HONORABLE JOHN S. RHOADES, UNITED STATES DISTRICT COURT, SOUTHERN

DISTRICT OF CALIFORNIA, APPELLEE, STEPHEN B. MACFARLANE, COUNSEL OF RECORD, and other parties in interest, Appellant Franchise Tax Board, State of California files this response to Appellee's Motion for Rehearing pursuant to Federal Bankruptcy Rule 8015.

## INTRODUCTION

This Court exercised its appellate jurisdiction over a final order of the bankruptcy court which adjudicated a claim of Appellant, Franchise Tax Board in the Macfarlane bankruptcy estate. *(28 U.S.C. § 158(a).)* On appeal this court affirmed the bankruptcy court's denial of the Board's claim and reversed the bankruptcy court's grant of summary judgment denying the Board's claim. The appellee filed a timely motion for reconsideration from this court's order. *(F.R.B.P. 8015).*

In their motion for reconsideration the appellee asks this Court to reconsider its ruling with respect to its reversal of the appellee's summary judgment motion.

Appellant Board contends that it is not necessary for this Court to expend its time in reconsidering its decision on the appeal from the bankruptcy court order in this case. The Board contends that there is no implied inconsistency with respect to this Court's appellate order regarding the Macfarlane matter.

## ARGUMENT

The fact that Macfarlane filed a motion for summary determination of a claim regarding the Franchise Tax Board is beyond dispute. By filing a motion for summary

determination with the bankruptcy court Macfarlane obviously expected the court to act on the motion.

The debtor's concern over the fact that this Court, exercising its appellate jurisdiction, affirmed the denial of the Board's claim while reversing its motion for summary determination is not problematic. This perceived inconsistency results from the different standards of proof governing claims adjudication versus motions for summary judgment as well as the differing standards that this Court must employ when exercising appellate jurisdiction over these matters. As set forth in this Court's opinion, "[T]he bankruptcy court's findings of facts on the merits are reviewed under the clearly erroneous standard, while the motion for summary judgment is reviewed de novo."

As a matter of law in ruling on a motion for summary judgment the record evidence is reviewed in the light most favorable to the party opposing the summary judgment motion. (*Nillson, Robbins, Dalgakn, et al. v. Louisiana Hydrolic,* 854 F.2d 1538, 1542 (9th Cir. 1988).) The court cannot and will not consider and weigh conflicts in the evidence in ruling on a summary judgment motion. (*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986).)

This Court, in its opinion pointed out the various inconsistencies in the evidence which precluded it from finding that a motion for summary judgment in favor of Macfarlane should have been granted. This Court found, that as a matter of law, the Board had met its burden in opposing a motion for summary judgment by designating

specific facts in the record evidence showing that a genuine issue for trial existed. (*Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986).)

The issue of whether or not the cash advances from Macfarlane to Cheng were loans involves the intent and state of mind of the parties. Cases involving motives, intent, or state of mind are inappropriate for resolution by a motion for summary judgment. (*Vucinich v. Paine Weber, et al.*, 739 F.2d 1434, 1436 (9th Cir. 1984); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 n.3 (9th Cir. 1980).)

The debtor's rehearing motion contending that, "a decision that is correct on any ground fairly supported by the record will be affirmed", followed by an extensive string citation support the Board's position that a rehearing in this case is absolutely unnecessary and would serve no purpose. This matter is best left to proceed to the Ninth Circuit for resolution so that the Ninth Circuit can rule on the burden of proof issue in bankruptcy courts in which there is a conflict between the United States Court of Appeals for the Fourth and Fifth Circuits.

## CONCLUSION

For the reasons stated this Court should refrain from granting the Appellee's motion for rehearing.

Dated: November 10, 1994

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Supervising Deputy Attorney
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ANTHONY SGHERZI,
Deputy Attorney General

---

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## APPENDIX C

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**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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|---|---|
| IN RE:<br>STEPHEN B. MACFARLANE,<br>Debtor. | ) District Court<br>) No. 93-1435G/R<br>)<br>) APPELLEE'S REBUTTAL TO APPELLANT'S RESPONSE TO APPELLEE'S MOTION FOR REHEARING |
| CALIFORNIA FRANCHISE TAX BOARD,<br>Appellant,<br>v.<br>STEPHEN B. MACFARLANE,<br>Appellee. | DATE: November 28, 1994<br>TIME: 10:30 a.m.<br>PLACE: Courtroom 5<br>940 Front Street<br>San Diego, Cal. |

Appellee responds to "Appellant's Response to Appellee's Motion for Rehearing" solely to note that Appellee does not want to deprive Appellant of its test

case in the Ninth Circuit. Appellee simply does not want to go there twice in the course of that test.

As extensively amplified in Appellee's motion, Appellee filed his objection to the Appellant's claim, the bankruptcy court ordered that the Appellant should have an opportunity for discovery, Appellant conducted no discovery, and Appellee moved in the alternative for summary judgment or for a determination on the evidence presented with the objection as is done in claims objection proceedings. The Court weighed the evidence, determined that the Appellant had not carried its burden and entered judgment.

Ironically, the Appellant is taking a position inconsistent with its desire to present the Ninth Circuit with the burden of proof issue. The Ninth Circuit could easily dispose of this matter without addressing the burden of proof issue if the judgment appealed from is a summary judgment. Appellee simply wants to avoid having to travel this route twice.

For the reasons stated in the Motion, the judgment based on the findings and conclusions which have been affirmed should also be affirmed both because the record supports that disposition and because it is consistent with the desire of both litigants to present the burden of proof issue to the Ninth Circuit in a context in which it must be decided.

Dated: November 14, 1994

Elmer Dean Martin III
Attorney for Appellee
Stephen B. Macfarlane

## APPENDIX D

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

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| In re STEPHEN B. MACFARLANE<br><br>Debtor. | ) | CASE NOS.<br>94-56064 94-56065<br><br>[DC # CV-93-01435-JSR<br>So. Dist. San Diego] |
| FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,<br><br>Appellant/Cross Appellee/Creditor,<br><br>-vs-<br><br>STEPHEN B. MACFARLANE,<br><br>Appellee/Cross Appellant/Debtor | ) | |

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**COMBINED CROSS APPEAL OPENING AND APPEAL REPLY BRIEFS OF STEPHEN B. MACFARLANE**

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APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Honorable John S. Rhoades
United States District Judge

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Appellee Stephen B. Macfarlane

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from district court review of a judgment of a bankruptcy court sustaining an objection to a claim for taxes asserted by the California Franchise Tax Board ("FTB"). The bankruptcy court had core matter jurisdiction under 11 U.S.C. § 505 and 28 U.S.C. § 157(b)(2)(B). This Court appears to have jurisdiction of the appeal and cross-appeal in this case from the order of the district court under 28 U.S.C. § 158(d). The district court had jurisdiction under 28 U.S.C. § 158(a) to hear an appeal from the final judgment of the bankruptcy court as noted by the FTB in its opening brief. The district court entered its judgment on June 29, 1994. Supp. ER9. On July 27, 1994 Debtor filed his notice of appeal from the portion of the judgment which related to reversal by the district court of summary judgment by the bankruptcy court timely as provided by FRAP 4(a)(1). Supp. ER3.

Debtor notes that the district court characterized its decision as a reversal of a summary judgment by the bankruptcy court but affirmed the bankruptcy court's findings and conclusions as not clearly erroneous. Supp.

ER9. This decision may be interpreted as requiring further proceedings in the bankruptcy court and therefore may not be a final order. *In re Bonner Mall Partnership*, 2 F.3d 899, 903 (9th Cir. 1993); *In re Vylene Ent., Inc.*, 96 F.2d 887, 891 (9th Cir. 1992). Debtor believes that this Court has jurisdiction for the reasons stated herein regarding the applicable standard of review.

Cross-Appellant Stephen B. Macfarlane ("Debtor") notes at the outset that this Court may determine that the FTB has failed to perfect its appeal because it may not have filed its opening brief and excerpts of record in conformity with this Court's rules. The FTB's brief and excerpts appear to be questionable as follows: (1) The docket of the district court is not included and references in the brief are not to the district court record. Certificate of Record second paragraph in Supp. ER2. Debtor adopts for its brief the convention of referring to the FTB's excerpts as ER (tab number) but with reference to the district court's docket number as DCR ___. The supplemental excerpts of the Debtor are referred to as Supp. ER (tab number) and are paginated separately for each tab number. The district court record was a stipulated record. Supp. ER1. Debtor's Supp. ER4, 5, 6 and 7 follow the four volume district court record retaining the district court record stamped numbers on the right bottom of each page. There is some minor duplication of pages in the FTB's excerpts for the sake of ease of reference inasmuch as the FTB did not refer to the district court record. Circuit Rule 30-1.4; (2) Certain of the FTB's excerpts are not paginated, including the district court's decision. Debtor has included paginated duplicate copies of these items in his excerpts for ease of reference. Circuit Rule

30-1.4; (3) Unnecessary inclusion of legal memoranda. Circuit Rule 30-1.3; 30-2; (4) Inaccurate references to ER. For instance, at page 29 of the FTB brief, the reference is to factual statements but the citation is to ER10 which is the Debtor's BAP objection. Circuit Rule 30-1.3; 30-2; (5) Failure to reference page numbers in large documents. ER6 is two depositions with 165 pages yet there are numerous references to it without page specification. Circuit Rule 30-1.3; 30-2; (6) No reference to bankruptcy judge. Court Rule 28-2.9; (7) Inappropriate and unsupported factual statements. See *infra*; (8) Improper size typeface in footnotes. FRAP 32; (9) No addendum of authorities. Circuit Rule 28-2.7; (10) No specification of where in the record an issue was raised or resolved in connection with the specification of standard of review. Circuit Rule 28-2.5; (11) No related case statement. Circuit Rule 28-2.6; (12) Length exceeds 35 pages. Circuit Rule 28-3.2; (13) Entire text not double spaced. FRAP 32(a); (14) No summary of argument. FRAP 28(a)(5).

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**APPENDIX E**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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| In re STEPHEN MACFARLANE )<br>Debtor. ) | CASE NOS.<br>94-56064<br>94-56065 |
| FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,<br>Appellant/Cross-Appellee/Creditor,<br>-vs-<br>STEPHEN MACFARLANE,<br>Appellee, Cross-Appellant/Debtor ) | [DC #<br>CV-93-01435-JSR<br>So. Dist. of<br>California] |

**ANSWERING BRIEF OF CROSS-APPELLEE AND APPELLANT FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA**

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## THE APPELLANT HAS APPEALED FROM A FINAL ORDER

The debtor-appellee devotes needless time questioning this Court's jurisdiction to review the district court decision at issue here, and implies that this decision may not be final merely because the case might ultimately be remanded back to the bankruptcy court where the controversy commenced. (DOB[1] at p. 5).

This Court has specifically held that the approach to finality of bankruptcy court orders "focuses on whether the decision appealed from 'effectively determined the outcome of the case', or determined a controversy. *(Elliot v. Four Seasons Properties (In re Frontier Properties, Inc.),* 979 F.2d 1358, 1363 (9th Cir. 1992); *Mason v. Integrity Ins. Co. (In re Mason),* 709 F.2d 1313, 1316 (9th Cir. 1983).) To determine whether a district court order is final the Ninth Circuit will look to the nature of the order. (*Security Pacific Bank Washington v. Steinberg,* 971 F.2d 387, 389 (9th Cir. 1992)).

In a one-winged flight of fantasy, the debtor-appellee cites absolutely no authority for the proposition that the finality of an order is diminished merely because an appellate court may remand the case back to a lower court for entry of an order consistent with its appellate opinion.

"The unique nature of bankruptcy proceedings dictate that we take a pragmatic approach to finality." (*Vylene Enter., Inc. v. Naugles,* 968 F.2d 887, 894 (9th Cir.

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[1] The designation "DOB" refers to Debtor-Appellee's Opening Brief.

1992); *In re Market Square Inn, Inc.*, 978 F.2d 116, 120 (3rd Cir. 1992)). The debtor-appellee cites no authority to the contrary.

## III.

## THROUGHOUT HIS BRIEF THE DEBTOR-APPELLEE CITES LEGAL AUTHORITY HAVING ABSOLUTELY NO RELEVANCE EITHER DIRECTLY OR INFERENTIALLY TO THE FACTS OF THIS CASE

The debtor-appellee cites the *Ojai Unified School District* case as an example of the appropriate standard of review this Court should employ with respect to the issues contained in its cross-appeal. (DOB p. 8). Since the *Ojai* case dealt with appellate review of an agency decision pursuant to 20 U.S.C. § 1412, et seq. (Individuals with Disabilities Education Act), it is totally irrelevant to the standard of review to be employed in this case.

The court in *Ojai* pointed out that "although (the procedure used here) is permissible under IDEA, *it is not a true summary judgment procedure.*" (*Ojai* at p. 1472). The debtor's brief fails to note this distinction. (DOB at p. 8).

Next, the debtor-appellee cites *Kreisner* for the incorrect legal proposition that the clearly erroneous standard of review should apply with respect to the summary judgment issue in this case. (DOB p. 8). What the debtor-appellee fails to reveal to this court is what the dissent in *Kreisner* expressly noted: that,

> " . . . garden variety summary judgment cases, like *Swarner*, are far different from this one." (*Kreisner* at p. 887 f.n.3).

The law in this circuit is clear. A grant or denial of a motion for summary judgment, including a determination as to whether genuine issues of material facts exist, is reviewed de novo.[2] (*U.S. v. Williams*, 994 F.2d 646, 648 (9th Cir. 1993); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323 (9th Cir. 1991)).

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[2] In addition, factual findings made under a mistaken view of the applicable law or using the incorrect legal standard are characterized as legal error. (*Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 855 f.n. 15).